FILED BY CLERK
OCT 31 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. RENA ARLIEN BREWER, Appellant.	)	2 CA-CR 2008-0107 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR95020491

Honorable Boyd T. Johnson, Judge
Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, appellant Rena Brewer was originally convicted of aggravated robbery and placed on probation for five years. The court subsequently extended, reinstated, and then revoked her probation, sentencing Brewer to a 2.5-year prison term. On appeal, she contends (1) the court extended her probation in violation of her right to due process, (2) the state presented insufficient evidence she had violated her probation, and (3) her sentence was illegal because it was not imposed by the proper judge and was based upon her failure to pay restitution. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 After accepting Brewer's guilty plea, Judge Johnson of the Pinal County Superior Court suspended the imposition of sentence and imposed a five-year term of probation to begin in April 1998. As a condition of her probation, the court ordered Brewer to serve ninety days in jail and pay restitution totaling $5,266.12. In March 2003, the state filed a petition to modify Brewer's probation. At the hearing on that petition, the court found she had paid less than $500 in restitution over the course of nearly five years and ordered her probation extended for three years pursuant to A.R.S. § 13-902(C)(1). Neither Brewer nor her counsel attended the hearing, and the record suggests neither had received prior notice of it. However, a copy of the modification order was sent to Brewer's most

recent attorney of record, Michael Bresnehan, who had been appointed two years earlier, in 2001.[1]

¶3 In 2005, the state filed a petition to revoke Brewer's probation based on her failure to report to her probation officer and failure to pay restitution. The court issued a bench warrant, and Brewer was arrested in October 2006. At the subsequent hearing, Brewer was represented by different counsel and admitted one of the six alleged probation violations, acknowledging she had failed to report as required. Neither Brewer nor her counsel challenged the March 2003 order extending her original five-year term of probation. At a disposition hearing held November 6, 2006, the court revoked the probation imposed in 1998 and reinstated Brewer to a one-year probationary term under the same conditions, increasing the amount of her monthly restitution payments in light of her improved financial situation and her expressed wish to satisfy this obligation.

¶4 The state again filed a petition to revoke probation in August 2007. At a contested violation hearing, Judge Johnson found Brewer had violated the terms of her probation by failing to report to her probation officer on one occasion. At the disposition hearing, Judge Pro Tempore Soos revoked her probation and sentenced her to a mitigated term of 2.5 years in prison. The disposition hearing had been scheduled to be held before

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[1]The record contradicts Brewer's assertion in her reply brief that "[t]here is no indication in the record . . . that Mr. Bresnehan ever represented [her]." Bresnehan was appointed as Brewer's counsel on March 12, 2001, at an initial appearance and arraignment on a petition to revoke probation. He twice appeared in court with Brewer, and the petition to revoke probation was subsequently dismissed.

Judge Johnson, and the record does not indicate why Judge Soos instead presided. This appeal followed.

Probation Extension

¶5 Brewer first argues that the trial court violated her right to due process at the March 2003 hearing and her sentence therefore should be vacated. Specifically, she claims that, "[b]ecause [her] probationary period was extended without proper notice to her, the extension was invalid *ab initio*," and she could not violate the terms of her probation after 2003 "because she was not legally on probation at the time." We review this question of law de novo. *See In re MH 2006-002044*, 217 Ariz. 31, ¶ 7, 170 P.3d 280, 282 (App. 2007).

¶6 As our supreme court stated in *State v. Korzuch*, 186 Ariz. 190, 193, 920 P.2d 312, 315 (1996), due process guarantees a probationer notice and an opportunity to be heard before probation may be extended. The *Korzuch* court also held that the lack of notice is not cured by subsequent hearings at which the validity of the probationary extension is not at issue, and the probationer "d[oes] not have the opportunity to question the decision to extend [the] probation." *Id.* at 194-95, 920 P.2d at 316-17. But in *Korzuch*, the defendant had filed a motion to vacate the modification order after learning of the ex parte extension and modification of his probation, the trial court had denied the motion, and the defendant appealed that ruling. *Id.* at 192, 920 P.2d at 314. Here, Brewer made no effort to challenge the extension of her probation in the trial court. To the contrary, she

admitted on October 23, 2006, that she had violated her probation conditions, and she litigated a subsequent petition to revoke probation in 2007 without any complaint about the March 2003 extension.

¶7 We therefore agree with the state's position that Brewer's delay in challenging the extension of her probation has deprived this court of jurisdiction to review the issue. A defendant may appeal from "[a]n order made after judgment affecting the substantial rights of the party." A.R.S. § 13-4033(A)(3). An order extending probation under § 13-902(C)(1) affects substantial rights and thus may be appealed. *See State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996) (noting modification of probation as ground for appeal). Notice of such an appeal, however, must be filed either within twenty days of the entry of the modification order or "within 20 days after service of an order granting a delayed appeal under Rule 32.1(f)[, Ariz. R. Crim. P.]." Ariz. R. Crim. P. 31.3(b). And Rule 32.1(f) allows for delayed appeals in the event "[t]he defendant's failure to file a . . . notice of appeal within the prescribed time was without fault on the defendant's part." In any event, "[t]he time for filing of a timely notice of appeal is essential to the exercise of jurisdiction by this court over the appeal." *State v. Berry*, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (App. 1982).

¶8 "Jurisdiction is the power to decide a case on its merits . . . ," *Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 83, 402 P.2d 22, 26 (1965), and we cannot consider the merits of an argument that should have been raised previously on appeal or in a different proceeding.

Cf. State v. Hughes, 22 Ariz. App. 19, 21, 522 P.2d 780, 782 (1974) (holding defendant must appeal from conviction within time specified by rules, not later time after probation revoked and time for appeal expired). Brewer should have challenged the court's extension of her probation in March 2003 either in a timely appeal after the extension order was served on her attorney; in a delayed appeal when she learned of the extension in October 2006; or in a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. *See* § 13-4033(B) ("[A] defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation."); *State v. Baca*, 187 Ariz. 61, 66, 926 P.2d 528, 533 (App. 1996) (probationer who admits violation may not appeal and can challenge sentence imposed at disposition only in proceeding for post-conviction relief). Because Brewer did not properly challenge the extension of her probation in a timely fashion, we cannot consider this issue on appeal.

Probation Violation

¶9 Brewer also argues the state's evidence was insufficient to establish she had violated her probation in 2007. We will not disturb a trial court's finding that a person has violated the terms of his or her probation unless the finding "is arbitrary or unsupported by any theory of the evidence." *State v. Sheehan*, 167 Ariz. 370, 371, 807 P.2d 538, 539 (App. 1991).

¶10 At the conclusion of a contested violation hearing, Judge Johnson revoked Brewer's probation after finding the state had proved one of the seven allegations in its

petition by a preponderance of the evidence. *See* Ariz. R. Crim. P. 27.8(b)(3) (for revocation of probation, violation "must be established by a preponderance of the evidence"). Specifically, the court found Brewer had violated her probation conditions by failing to report to her probation officer "[o]n or about July 24, 2007."

¶11 The evidence showed that Brewer's probation officer had sent a certified letter to Brewer's address requiring her to report on July 24, and someone other than Brewer had signed for the letter. The letter further informed Brewer that her courtesy supervision in Maricopa County was being closed due to other suspected probation violations. *See* Ariz. R. Crim. P. 27.2(a). Implying that her son had signed for the letter, Brewer testified that she never received it and consequently was unaware of her obligation to report on that date. However, she acknowledged that she had known she needed to report on a monthly basis. The court found Brewer had received written notice of her obligation to report from the certified letter and, by failing to do so, had violated the terms and conditions of her probation.

¶12 Without citing any authority, Brewer argues on appeal that the certified letter sent by the probation department needed to comply with the service requirements of Rule 3.4, Ariz. R. Crim. P., which concerns service of a criminal summons by mail, or the analogous Rule 4.2, Ariz. R. Civ. P. We find these rules, the former which addresses the required notification of a defendant upon the initiation of felony criminal charges and the latter, which concerns service of process in civil cases, wholly inapplicable to Brewer's case.

As a standard term of her probation, Brewer was required to report to her probation officer once a month or as directed. A certified letter, delivered to her house and accepted by her son, directed her to report on July 24, 2007. This evidence sufficiently supports the court's finding that Brewer knew of her obligation to report on this date, notwithstanding her testimony to the contrary. *See State v. Lee*, 217 Ariz. 514, ¶ 10, 176 P.3d 712, 714 (App. 2008) (trier of fact, not appellate court, must determine witness's credibility and resolve conflicts in evidence). Thus, the court's finding that Brewer had violated her probation was not arbitrary or clearly erroneous, and we affirm its order revoking probation.

Sentence

Sentence Imposed By Different Judge

¶13 Brewer contends she was denied due process "because she was sentenced by a judge who had not conducted the violation hearing and was unfamiliar with her case." Brewer did not object to being sentenced by Judge Soos rather than Judge Johnson; hence, it is her burden to show fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). We find no error—fundamental or otherwise—in the disposition of this case.

¶14 Brewer appears to rely on Rule 27.8, Ariz. R. Crim. P.,[2] and *State v. Astorga*, 26 Ariz. App. 260, 547 P.2d 1060 (1976), to support her argument that a "disposition hearing on a petition to revoke probation should . . . be[] held by the same judge who placed [the person] on probation." Yet *Astorga*, which concerned what is now Rule 27.8(e) and the revocation of probation based on a subsequent determination of guilt, neither applies to this case nor supports her argument. *See Astorga*, 26 Ariz. App. at 262, 547 P.2d at 1062. To the contrary, Rule 27.8(e) allows precisely what Brewer argues due process prohibits: probation revocation and disposition by a judge other than the one who placed the person on probation. *See Astorga*, 26 Ariz. App. at 262, 547 P.2d at 1062. And the only language in Rule 27.8 requiring a proceeding to occur before a specific judge appears in Rule 27.8(a)(1), which provides that the same judge who issues a probationer's arrest warrant should preside over "[t]he revocation arraignment"—unless another judge is assigned. No due process violation occurs at a disposition hearing when a judge of the same court, who is equipped with the necessary file and familiarity with the case, sentences a defendant whose probation has been revoked. *See State v. Flemming*, 184 Ariz. 110, 113-14, 907 P.2d 496, 499-500 (1995) ("meaningful disposition" requires court to have probationer's

[2]Although she cites Rule 27.7, Ariz. R. Crim. P., in her opening brief, this rule concerns a probationer's initial appearance after arrest. We assume Brewer intended to refer to Rule 27.8, which concerns probation revocation proceedings. Rule 27.7 was renumbered as Rule 27.8 in 2005. 210 Ariz. LXIV.

file, just as sentencing court would have file containing presentence report, plea agreement, and related documents).

¶15 Here, Judge Soos indicated he had reviewed Brewer's predisposition report and announced he was inclined to impose the minimum term of imprisonment. He heard argument from Brewer's attorney, including the request that the court "terminate her probation unsuccessfully," and he allowed Brewer to address the court before he pronounced her sentence. The record thus suggests the disposition hearing afforded Brewer due process consistent with the federal and Arizona constitutions. *See State v. Flowers*, 159 Ariz. 469, 471, 768 P.2d 201, 203 (App. 1989); *see also Black v. Romano*, 471 U.S. 606, 616 (1985) (finding no due process violation when probationer given opportunity to present sentencing judge with mitigating factors and alternatives to incarceration).

Illegal Sentence

¶16 Brewer also argues her sentence was illegal because it was based on her failure to pay restitution, not on her failure to report to her probation officer, the latter being the sole ground in the record for revoking her probation. Brewer claims "the predisposition report focuse[d] on [her] failure to pay restitution," and she appears to conclude from this that "Judge Soos . . . sentenced [her] to prison based on her consistent failure to pay restitution." We will not disturb a sentence within the statutory range absent an abuse of discretion, *State v. Fell*, 210 Ariz. 554, n.7, 115 P.3d 594, 599 n.7 (2005), and "we assume that the sentence imposed was not the product of motivations amounting to an abuse of

discretion." *State v. Rowe*, 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977). Accordingly, we find no abuse of discretion here.

¶17 After revoking a defendant's probation, a trial court must impose a sentence based on the original offense, not on the violation of probation alone. *State v. Baum*, 182 Ariz. 138, 140, 893 P.2d 1301, 1303 (App. 1995). When imposing sentence, a court is directed to consider all relevant aggravating and mitigating circumstances. *Id.* To this end, a court may consider information in a presentence report. *State v. Elmore*, 174 Ariz. 480, 484, 851 P.2d 105, 109 (App. 1992).

¶18 Here, Brewer's predisposition report did note her failure to pay restitution, along with other background information relevant to the case, and the author recommended Brewer be sentenced to prison. At the disposition hearing, Judge Soos indicated he had reviewed the predisposition report, and Brewer's counsel raised the issue of restitution, observing:

> Judge Johnson's concern at [the probation violation hearing] . . . was he was disturbed about the fact of restitution. I mean, the fact that she had only paid $560 with the restitution. He even extended the probation an additional 5 years [sic] to give her more of an opportunity to pay this restitution. And I believe that was the concern that he expressed and he wished us to address at this disposition.

The state then correctly clarified that Brewer's probation had been revoked based on her failure to report to her probation officer and that she was not found in violation for failing

to make restitution payments, even though Judge Johnson had noted her lack of progress in that regard.

¶19 Judge Soos observed that Brewer had received a favorable plea agreement and had been given several opportunities to complete probation, but he made no reference to her failure to pay restitution. He then sentenced Brewer to serve 2.5 years in prison—the statutory minimum for a class three felony such as aggravated robbery—after first finding all the mitigating factors listed in her presentence report: her responsibility for her children, her lack of a prior felony record, and her remorse. *See* A.R.S. §§ 13-702(A)(2), 13-1903(B). Thus, nothing in the record suggests the trial court imposed the sentence based on Brewer's failure to pay restitution. In the absence of any indication in the record that the trial court imposed a prison term in whole or in part on that arguably improper basis, *see State v. Robinson*, 142 Ariz. 296, 297-98, 689 P.2d 555, 556-57 (App. 1984) (court must consider probationer's ability to pay restitution before restricting liberty on that ground), we assume the trial court followed the law. *See State v. Johnson*, 212 Ariz. 425, ¶ 21, 133 P.3d 735, 742 (2006).

Conclusion

¶20 For the foregoing reasons, we affirm the revocation of Brewer's probation and the sentence imposed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge